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In the

Supreme Court of the United States

October Term, 1958

No. [redacted] 113

ELLIS B. GRADY, JR., ADMINISTRATOR, C. T. A., OF MARGARETTE W. RODGERS, DECEASED,
Petitioner

v.

RICHARD EUGENE IRVINE,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
HOW THE FEDERAL QUESTION AROSE	2
SUMMARY STATEMENT OF THE MATTER INVOLVED	2
QUESTION PRESENTED	3
The Sole Question Presented Is Whether the Substitution of the Administrator in the Place and Stead of the Plaintiff Destroyed the Jurisdiction of the Court	3
ARGUMENT	3
Point I — Diversity of Jurisdiction Having Existed at the Commencement of the Action, the Subsequent Change of Citizenship of the Plaintiff Did Not Oust It	3
CONCLUSION	7

TABLE OF CASES

Mercer v. City of Richmond, 152 Va. 736, 744, 148 S. E. 803, 805	6
Smith v. Sperling, 117 F. Supp. 781, 77 S. Ct. Rep. 1113, 1114	3

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review a final judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled case on the 8th day of April, 1958.

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Virginia (not yet reported) is found on page 4-b of the transcript, being pages 6 to 15, both inclusive, of the printed Appendix to appellant's brief filed in the Court of Appeals. The opinion of the Court of Appeals (not yet reported) is found on page 3 of the transcript.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on April 8, 1958. Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1); jurisdiction having been originally obtained upon the ground of diversity of citizenship. Constitution, Article III, Section 2; United States Code Annotated, Title 28, Section 1332(1).

HOW THE FEDERAL QUESTION AROSE

Petitioner's decedent departed this life after having filed this suit in the District Court. Before it was determined, decedent died and petitioner qualified as her personal representative and sought to continue the litigation. The judgment below denied the petitioner the right to continue litigation and dismissed the case on the ground that when petitioner came into the case the jurisdiction of the Court was destroyed because petitioner and the defendant were citizens of the same state.

SUMMARY STATEMENT OF THE MATTER INVOLVED

Margarette W. Rodgers, appellant, a citizen of the State of Maryland, was seriously and permanently injured on October 29, 1955, when she was struck by an automobile driven by appellee, Richard Eugene Irvine, a citizen of the State of Virginia, while she was walking across Main Street in the City of Waynesboro, Virginia.

In January, 1957, she filed her complaint against Irvine in the United States District Court for the Western District of Virginia at Harrisonburg for the recovery of damages for her injuries. On February 9, 1957, Irvine filed his answer.

Subsequently, while the suit was pending, the plaintiff died and Ellis B. Grady, Jr., as administrator, c.t.a., of the plaintiff filed his motion to be substituted for the plaintiff. Grady is a citizen of the State of Virginia. The District Court allowed the substitution, but after allowing the substitution, then of its own motion, dismissed the action upon the ground that diversity of citizenship no longer existed since both the Administrator and the defendant were citizens of the State of Virginia.

QUESTION PRESENTED

The sole question presented is whether the substitution of the administrator in the place and stead of the plaintiff destroyed the jurisdiction of the Court.

ARGUMENT

Point I

Diversity of Jurisdiction Having Existed At the Commencement of the Action, the Subsequent Change of Citizenship of the Plaintiff Did Not Oust It.

The general rule on this subject is that Federal jurisdiction depends on the facts as they exist at the time the action is commenced. It is not conferred or divested by later changes. Loss of diversity of citizenship through substitution of one party for another does not destroy jurisdiction. This principle applies where, at the time of the filing, there is diversity of citizenship between the plaintiff and the defendant, and the plaintiff dies and his administrator who is substituted for him, is a citizen of the same state as the defendant.

The principle, with the citation of many authorities, is well stated by Judge Mathes, District Judge, in *Smith* v. *Sperling*, 117 F. Supp. 781, from which we quote as follows:

"As the parties were aligned by plaintiff, complete diversity of citizenship appeared from the face of the complaint upon commencement of the action. Pacific R. Co. v. Ketchum, 1879, 101 U. S. 289, 298, 25 L. Ed. 932. Prior to trial the original plaintiff, New York citizen Edward S. Birn, died and the Probate Court of California appointed Charles B. Smith as Special Administrator of the estate. Cal. Prob. Code, §§460, 463. Smith, a citizen of California, was thereupon substituted as party plaintiff. Fed. Rules Civ. Proc. rule 25(a), 28 U. S. C. A.

"Where diversity jurisdiction exists at the commencement of an action, a subsequent change of citizenship of one of the parties does not oust it. Wichita R. R. & Light Co. v. Public Utilities Comm., 1922, 260 U. S. 48, 53-54, 43 S. Ct. 51, 67 L. Ed. 124; Louisville N. A. & C. Ry. Co. v. Louisville Trust Co., 1899, 174 U. S. 552, 566, 19 S. Ct. 817, 43 L. Ed. 1081; Clarke v. Mathewson, 1838, 12 Pet. 164, 37 U. S. 164, 171, 9 L. Ed. 1041; Dunn v. Clarke, 1834, 8 Pet. 1, 33 U. S. 1, 2, 8 L. Ed. 845; Mullen v. Torrance, 1824, 9 Wheat. 537, 22 U. S. 537, 538. It follows then that while the citizenship of the administrator at bar would have been a factor if he had originally brought the action, his citizenship as substituted party plaintiff is held not to affect determination as to diversity jurisdiction. See Continental Life Ins. Co. v. Rhoads, 1886, 119 U. S. 237, 7 S. Ct. 193, 30 L. Ed. 380; Blake v. McKim, 1880, 103 U. S. 336, 26 L. Ed. 563; Amory v. Amory, 1877, 95 U. S. 186, 24 L. Ed. 428; Rice v. Houston, Adm'r., 1871, 13 Wall. 66, 80 U. S. 66, 21 L. Ed. 484; cf. Jeffcott v. Donovan, 9 Cir., 1943, 135 F. 2d 213."

This case was before the Circuit Court of Appeals for the Ninth Circuit, 237 F. 2d 317. Due to the re-alignment of the parties and other procedures it was not necessary for the Circuit Court of Appeals to expressly pass upon this question. However, the case was appealed by one of the

parties to the United States Supreme Court and was there decided on June 10, 1957, 354 U. S. 91, 77 Sup. Ct. Rep. 1112. The Court apparently considered the question here presented so well-settled that it deserved attention only in a footnote in relation to the history of the case. We quote from the footnote at pages 1113 and 1114 of 77 Sup. Ct. Reporter:

> "1. While the action was pending plaintiff died and for him a special administrator has been substituted. The latter is a citizen of California.
>
> "Had the suit been originally commenced by the decedent's representative, it would have been the citizenship of the representative which would have been determinative of jurisdiction in this diversity case. See Chappedelaine v. Dechenaux, 4 Cranch 306, 2 L. Ed. 629; Childress v. Emory, 8 Wheat. 642, 669, 5 L. Ed. 705; Mexican Central R. Co. v. Eckman, 187 U. S. 429, 434, 23 S. Ct. 211, 213, 47 L. Ed. 245; Mecom v. Fitzsimmons Drilling Co., 284 U. S. 183, 186, 52 S. Ct. 84, 85, 76 L. Ed. 233. But jurisdiction, once attached, is not impaired by a party's later change of domicile. Mullen v. Torrance, 9 Wheat. 537, 6 L. Ed. 154. As Chief Justice Marshall said in that case: 'It is quite clear, that the jurisdiction of the Court depends upon the state of things at the time of the action brought, and that after vesting, it cannot be ousted by subsequent events.' Id., 9 Wheat. at page 539. The rationale, that jurisdiction is tested by the facts as they existed when the action is brought, is applied to a situation where a party dies and a non-diverse representative is substituted. Dunn v. Clarke, 1834, 8 Pet. 1, 8 L. Ed. 845."

There are other cases to the same effect in the reports of the District Courts and the United States Courts of Appeals, but since the highest Court of the land has thus expressed

itself upon the question so recently, we think it would be a work of superogation to cite and quote from those cases.

Rules 24(c) and 25(a) of the Federal Rules of Civil Procedure expressly provide for the procedure which was followed in this case. While State rules of procedure are not controlling in the Federal Court, they nevertheless show the theory of the amended Complaint of Substitution. In *Mercer v. City of Richmond*, 152 Va. 736, 744, 148 S. E. 803, 805, the Court said, referring to Section 8-628.1 of the Code of Virginia:

> "That section provides in effect that 'no cause of action' for injury shall be lost (as it would have been at common law) because of the death of the person injured, but in an action for damages for the injury there shall be no recovery for mental anguish, pain or suffering. If it had been the legislative purpose to exclude from the rule thus laid down, actions that had been brought during the life of the deceased and revived in the name of his personal representative under section 8-640, it would have been easy to provide for that. On the contrary, the statute as written deals with the cause of action and takes away an element of the cause of action whether the action therefor is begun by the injured person in his lifetime or by his personal representative after his death, as a condition of allowing the right of action for that cause *to survive*." (Italics supplied)

In dealing with cases where the injured person dies pending the action, the Court repeatedly uses language "permitting the revival of an action for personal injuries" where the person dies pending the action; "the revived action"; "the right of revival of actions for injuries"; "revived in the name of his personal representative."

CONCLUSION

In conclusion, we submit, with deference, and yet with confidence, that whatever may be the nature of the action as originally brought, when the plaintiff dies pending the action, the procedure provided by statute and rule of Court provides for a revival of the cause of action which the injured person had and therefore, the fact that the administrator substituted for the plaintiff in such a revived cause of action is a citizen of the same state as the defendant does not oust the jurisdiction of the Court properly acquired in the first instance.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Geo. E. Allen, attorney for Ellis B. Grady, Jr., Administrator, c. t. a., of Margarette W. Rodgers, deceased, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 17th day of June, 1958, I served a copy of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit, on Respondent, by mailing 2 copies

in a duly addressed envelope, first class postage prepaid, to Wayt B. Timberlake, Esquire, attorney for Richard Eugene Irvine, Industrial Loan Building, Staunton, Virginia.

GEO. E. ALLEN
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